IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79 - 1631

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA AND DEMOCRATIC NATIONAL COMMITTEE,

APPELLANTS,

v.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE, AND DEMOCRATIC PARTY OF WISCONSIN,

APPELLEES,

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

MOTION FOR LEAVE TO FILE

AND

BRIEF AMICUS CURIAE

THOMAS F. NEALON III
60 CHATSWORTH AVENUE
LARCHMONT, NEW YORK
10538
(914) 834-8746
ATTORNEY FOR THE DEMOCRATIC CONFERENCE
AMICUS CURIAE

AUGUST 23, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1631

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA AND DEMOCRATIC NATIONAL COMMITTEE,

APPELLANTS,

v.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE, AND DEMOCRATIC PARTY OF WISCONSIN,

APPELLEES,

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Democratic Conference hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for each of the appellants has been obtained. The consent

of the attorneys for each of the appellees was requested but has not been received.

The Democratic Conference, as a group vitally concerned with the future of the Democratic Party, views the decision by the Wisconsin Supreme Court in this case as a serious threat to the future of the party system in the United States. The Democratic Conference and those affiliated with it have been instrumental in effecting many of the reforms instituted by the Democratic Party over the past twelve years, including the requirement that participation in the delegate selection process be restricted to Democratic voters who publicly declare their party preference.

The constitutionally protected right of political association which this Court recognized in Cousins v. Wigoda, 419 U.S. 477 (1975), is especially meaningful and important to the Democratic Conference. The right to associate with others

in the political party of one's choice is one of the most cherised rights enjoyed under our constitutional form of government. This freedom of association is infringed upon by operation of the Wisconsin open primary election law. Under the Wisconsin statute the relative strengths and weaknesses of each component group within the Democratic Party are distorted and exaggerated. This is particularly significant to minority coalitions such as the Democratic Conference. The crossover voters which characterize the open primary system commonly have different candidate preferences than the Democratic party voters in the electorate. See Adamany, Crossover Voting and the Democratic Party's Reform Rules, American Political Science Review, June, 1976.

Every group or organization is equal to the sum of its parts and this is

equally true of political parties. In recognition of the fundamental free association, due process and equal protection rights of each component group and each person within each group, the Democratic Party has adopted a presidential nomination system to insure, as far as possible, that each voter and each group has a real opportunity to reflect their true candidate preference in the delegate selection and nominating processes. This Court, in Cousins v. Wigoda, recognized the vital role of coalitions, often cutting across state lines, in the process of choosing Presidential and Vice-Presidential candidates. 419 U.S. 477, 490 (1975).

As a group which has been in the forefront of the reform movement within the Democratic Party and as a group with an active, if not majority, role in shaping Democratic Party issues, the Democratic

Conference considers its future and the future of similar groups and organizations dubious if the decision of the Wisconsin Supreme Court is allowed to stand. The National Democratic Party requirement that only publicly declared and recorded Democrats may participate in the delegate selection process is not a concern of the National Democratic Party alone but is equally a concern of minority reform groups such as the Democratic Conference. The Second Circuit Court of Appeals acknowledged this fact in Rosario v. Rockefeller:

> [T]he efficacy of the party system in the democratic process-its usefulness in providing a unity of divergent factions in an alliance for power - would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs. 458 F.2d 649, 652 (2d Cir. 1972), aff'd, 410 U.S. 752 (1973).

We respectfully request that we be granted leave to file a brief amicus curiae in this case in support of appellants, Democratic Party of the United States of America and Democratic National Committee.

Respectfully submitted,

THOMAS F. NEALON III
60 Chatsworth Avenue
Larchmont, New York 10538
(914) 834-8746

Attorney for the Democratic Conference

INDEX

		Page
Interest of Amicus Curiae.....		2
Argument.....		3
I	The Democratic National Party and Its Adherents Enjoy Constitutionally Protected Rights in the Areas of Delegate Selection and Nomination of Candidates for President and Vice President Which Outweigh Any Countervailing State Interest.....	5
II	The Democratic National Party, Through Its Rules, Regulations, Procedures and Decisions, Has Declared Unequivocally Its Commitment To Making the Process of Nominating Our Chief Executive More Democratic and Meaningful.....	15
CONCLUSION.....		23

AUTHORITIES CITED

Cases:

Cousins v. Wigoda, 419 U.S. 477 (1975)..... passim

Elrod v. Burns, 427 U.S. 347 (1976)..... 9, 10

	Page
Kusper v. Pontikes, 414 U.S. 51 (1973).....	5, 10
NAACP v. Alabama, 357 U.S. 449 (1958).....	7
State ex rel. LaFollette v. Democratic Party, 287 N.W. 2d 519 (1980).....	passim
Williams v. Rhodes, 393 U.S. 23 (1968).....	6
Constitutional Provisions:	
U.S. Const. 1st and 14th Amendments.....	passim
Miscellaneous Authorities:	
Americans For Democratic Action, "Let Us Continue...", A Report on the Democratic Party's Delegate Selection Guidelines (1973).....	17
Charter and By-Laws of The Democratic Party of the United States (1974).....	19
Delegate Selection Rules For the 1980 Democratic National Convention (June, 1978).....	20, 21

Index Continued

Page

Democrats All: A Report of the Commission on Delegate Selection and Party Structure (December 1973)..... 18

Mandate for Reform, A Report of the Commission on Party Structure and Delegate Selection (April 1970)..... 15-18

Official Guidelines For Delegate Selection, A Report of the Commission on Party Structure and Delegate Selection (November, 1969)..... 16

Openness, Participation and Party Building: Reforms for a Stronger Democratic Party (February, 1978)..... 19, 20

IN THE

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1979

NO. 79-1631

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA AND DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

v.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE, AND DEMOCRATIC PARTY OF WISCONSIN,

Appellees,

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF AMICUS CURIAE FOR THE DEMOCRATIC CONFERENCE

This brief is presented in support of appellants.

We rely on appellants' treatment of this Court's jurisdiction, of the opinion below, of the questions presented, of the constitutional provisions involved and of the Statement of the Case.

INTEREST OF AMICUS CURIAE

Since its formation in 1975 the Democratic Conference has played an important role in Democratic Party organizational issues. Its organizing committee includes members of Congress, state party officers and officials from international unions, as well as representatives from womens' and minority organizations. The Democratic Conference is an informal coalition of active Democrats and organizations who seek to strengthen the party system in the United States. Its supporters, who cut across candidate lines, are interested in

issues which relate to future Democratic Party structure independent of any candidate considerations.

Amicus Curiae views the decision below by the Wisconsin Supreme Court as a grave and serious threat to the party system in the United States and to the progress which has been achieved in recent years in making the Democratic Party and its political processes more open, democratic and meaningful.

ARGUMENT

This case presents the fundamental and critical question of the relationship between state laws dealing with the selection of delegates to national party nominating conventions, on the one part, and the rules, regulations, procedures and decisions of the national party relating to the selection of delegates to

nominating conventions and these nominating convention themselves. Amicus Curiae maintains that the holding below by the Wisconsin Supreme Court "that the Wisconsin open primary law violates neither the State nor the federal constitution", 287 N.W. 2d 519, 522 (1980), disregards the recognition by this Court of the constitutional rights of political association of the Democratic National Party and its adherents and threatens to nullify the numerous advances achieved in recent years in making the process of selecting candidates for the two highest elective offices in the Nation more democratic and meaningful.

I

THE DEMOCRATIC NATIONAL PARTY AND ITS ADHERENTS ENJOY CONSTITUTIONALLY PROTECTED RIGHTS IN THE AREAS OF DELEGATE SELECTION AND NOMINATION OF CANDIDATES FOR PRESIDENT AND VICE PRESIDENT WHICH OUTWEIGH ANY COUNTERVAILING STATE INTEREST

This Court in its decision in Cousins v. Wigoda, 419 U.S. 477 (1975), stated categorically that "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association." 419 U.S. at 487, see also Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973). This freedom of political association for the purpose of advancing common political beliefs and

ideas is at the heart of our democratic process and is protected from federal encroachment by the First Amendment to the Constitution. In prior decisions this Court has recognized and extended this concept to protect against infringement by state action. 419 U.S. at 487, see also Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Time and again this Court and others have reiterated the proposition that associational rights lie at the "core of our electoral process and of First Amendment freedoms." Williams v. Rhodes, 393 U.S. at 32. They are therefore accorded the fundamental protection afforded by the First and Fourteenth Amendments to the Constitution.

It can not be denied that appellants in this case enjoy fundamental constitutional rights of free political association. Against this interest must be weighed the state interest in maintaining its own electoral process. As this Court has stated on numerous occasions, in weighing these competing interests, it is not sufficient that the state interest be legitimate but rather it must be "compelling" in order to justify infringement upon constitutionally protected rights of appellants. NAACP v. Alabama, 357 U.S. 449, 463 (1958).

The Wisconsin Supreme Court in its decision set forth the competing interests it had to balance:

> [T]hat of the National Party and its adherents to associate for the advancement of political beliefs, including the nomination of candidates for political office; that of Wisconsin citizens to cast their votes in the primary election, a significant step in the process of electing the President of the United States; that of Wisconsin citizens not to have their association with a political party a matter of public record; that of the state to protect and preserve the integrity of the nominating process and to conduct the primary, and political party participation therein, in a fair and orderly manner. 287 N.W. 2d at 522.

After weighing these interests the Wisconsin Supreme Court determined "that Wisconsin has a compelling state interest in not requiring that voters publicly declare their party preference and have that preference publicly recorded". Id.

In arriving at this conclusion the Wisconsin Supreme Court makes a fundamental error regarding which party bears the burden of persuasion when an infringement upon constitutional rights is alleged. The Wisconsin Supreme Court claims that "[t]he National Party has the duty of persuading us that this is a situation in which a state statute significantly infringes the National Party's associational rights". Id. at 530. Having demonstrated, as appellants have here, that they enjoy constitutionally protected rights which have been infringed upon by the state statute, the burden shifts to the state to demonstrate that it has a compelling interest in doing so. This Court recognized this principle in Elrod v. Burns, 427 U.S. 347 (1976):

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny....Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." Kusper v. Pontikes...The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. 427 U.S. at 362.

Regardless of how legitimate the Wisconsin state interest may be, and in this case the legitimacy of requiring the Democratic Party to permit Republicans, independents and others to influence its nominating process is dubious, it certainly fails to meet the standard of "compelling". This is a burden which the state must meet and, failing to do so, it can not and should not be allowed to impair and infringe upon the First Amendment rights of the Democratic National Party and its adherents.

In its decision the Wisconsin Supreme Court attempts to minimize the impact of its "open" primary law on the grounds that "the sole function of the Wisconsin presidential preference primary is to apportion the number of delegates among the presidential candidates on the ballot for that party". 287 N.W. 2d at 524. As the Wisconsin court points out "[t]he process of selecting the convention delegates in Wisconsin is under the control and direction of the State Party". Id. Since the actual selection of delegates is within the control of the Wisconsin Democratic Party and participation in their selection is limited to persons who publicly proclaim their allegiance to the Democratic Party, the Wisconsin Supreme Court deduced that the effects of the open primary on the nominating process were

minimal. This argument overlooks one crucial fact, i.e. that delegates to the national convention are bound to cast their votes at the convention in accordance with the outcome of the presidential preference vote in which all voters participated. This interaction between the delegate selection process and the presidential preference vote can not be ignored in assessing the infringement that the Wisconsin statute causes upon the associational rights of the Democratic National Party and its adherents.

The delegate selection and nominating processes of the Democratic Party are of paramount importance, not only to the Democratic Party but to the whole Nation. As this Court pointed out in its decision in Cousins v. Wigoda, the "States themselves have no constitutionally mandated role in the great task of the selection of Presi-

dential and Vice-Presidential candidates". 419 U.S. at 489-90. In this area, however legitimate the interest of the state, this state interest must yield to the overriding national interest of preserving the effectiveness of the selection of candidates for President and Vice President. If it were otherwise, a party's delegate selection and nominating processes could be subjected to the endless conflicting demands of each of the fifty states, which would render meaningless the associational rights of the Democratic National Party and its adherents. Amicus Curiae firmly adheres to the position this Court enunciated in Cousins v. Wigoda that the "Convention serves the pervasive

national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." 419 U.S. at 490.

Applying the rationale and standard of the Cousins v. Wigoda decision to this case makes the paramount right of the Democratic National Party to govern its own delegate selection and nominating processes indisputable. The state of Wisconsin has failed to demonstrate that its interest is compelling. In the absence of such a showing, this Court can not and should not let stand the decision of the Wisconsin Supreme Court which infringes upon the constitutionally protected associational rights of the Democratic National Party and its adherents.

II

THE DEMOCRATIC NATIONAL PARTY, THROUGH ITS RULES, REGULATIONS, PROCEDURES AND DECISIONS, HAS DECLARED UNEQUIVOCALLY ITS COMMITMENT TO MAKING THE PROCESS OF NOMINATING OUR CHIEF EXECUTIVE MORE DEMOCRATIC AND MEANINGFUL

In the aftermath of the 1968 Democratic National Convention the Democratic National Party studied, reviewed and recommended reforms in its rules for selecting nominees for President of the United States. This process commenced with the establishment of a Commission on Party Structure and Delegate Selection (the McGovern/Fraser Commission), which made profound and far-reaching recommendations for reform. Mandate for Reform, A Report of the Commission on Party Structure and Delegate Selection (April, 1970).

Among these recommendations the McGovern/ Fraser Commission required State Parties to adopt rules that would facilitate maximum participation among interested Democrats in the processes by which National Convention delegates are selected. In addition this Commission, in its guidelines for delegate selection, gave explicit recognition to the fact that "a full opportunity for all Democrats to participate is diluted if members of other political parties are allowed to participate in the selection of delegates to the Democratic National Convention." Official Guidelines For Delegate Selection, A Report of the Commission on Party Structure and Delegate Selection (November, 1969).

The recommendations of the Mc Govern/Fraser Commission were subsequently incorporated into the Call to the 1972 Convention.[1] They were also favorably received by those monitoring their implementation at the 1972 Democratic National Convention. Americans For Democratic Action, "Let Us Continue...", A Report on the Democratic Party's Delegate Selection Guidelines (1973). The 1972 Convention renewed the mandate for reform of the delegate selection and nominating processes by calling upon the Democratic National Committee to appoint a new commission to review and recommend reforms in the procedures for delegate selection utilized for the 1972 Convention. The

---

1. The Call sets forth the formal requirements of the delegate selection and nominating processes for each national convention.

Commission on Delegate Selection and Party Structure (the Mikulski Commission), as the successor to the McGovern/Fraser Commission, addressed itself to enhancing the role of every Democrat in the delegate selection and nominating processes. Democrats All: A Report of the Commission on Delegate Selection and Party Structure (December, 1973). The Mikulski Commission made a number of recommendations, some basically reiterating the recommendations of the McGovern/Fraser Commission and others of a more significant nature. Among these the Mikulski Commission unequivocally mandated that "State Parties must take all feasible steps to restrict participation in the delegate selection process to Democratic voters only." Id. This recommendation was in marked contrast to the more general discussions of this topic contained in the

McGovern/Fraser Commission Report and was incorporated into the Delegate Selection Rules for the 1973 Convention.

As further evidence of the level of commitment the National Democratic Party had to these reforms, the Party, in adopting its Charter and By-Laws in 1974, specifically included among its qualifications for delegates that they be chosen through processes which "restrict participation to Democrats only". Article Two, section 4, Charter of the Democratic Party of the United States.

In 1975 the National Democratic Party established another commission to review and evaluate the delegate selection and nominating processes known as the Commission on Presidential Nomination and Party Structure (the Winograd Commission). In its report the Winograd Commission out-

lined the historical developments in the Democratic Party nominating process, made certain recommendations not involving rules changes and also set forth elaborate and specific proposed delegate selection rules for the 1980 Convention. Openness, Participation and Party Building: Reforms for a Stronger Democratic Party (February, 1978). The Winograd Commission specifically recognized the problems posed by open and crossover primaries and proposed delegate selection rules for the purpose of solving these problems. Among other findings the Winograd Commission recommended that "participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who declare their party preference and have that preference publicly recorded." Id. at 69.

In its Delegate Selection Rules

for the 1980 Democratic National Convention the Democratic National Committee sought to implement the recommendations of the Winograd Commission in order to maximize the participation of Democrats in the process of selecting delegates and nominating candidates. Rule 2A is a direct outgrowth of that motivation and includes, verbatim, the language of the Winograd Commission. To further buttress its commitment to restrict the delegate selection and nominating processes to Democratic voters the Delegate Selection Rules for the 1980 Democratic National Convention, in Rule 2B, specifically state that no Rule 20 exemption, on the basis of a conflict between a given rule and state law, shall be granted from compliance with the requirements of Rule 2A.

Since 1968 the Democratic Party has implemented a series of reforms for the purpose of making Democratic voter participation in the selection of delegates and nomination of candidates for our Nation's two highest elective offices more democratic and meaningful. These have ranged from abolition of the unit rule, which permitted winner-take-all primary results, to the requirement that delegations fairly reflect the division of preference of those participating in the presidential nominating process. In addition the Party has continued to support the concept of an "open party" which guarantees a full opportunity for minority group participation. Amicus Curiae views these reforms as extremely meaningful and vital to the future of the Democratic National

Party. In addition, these reforms have been instrumental in enabling the adherents of the Democratic Party to exercise the constitutionally guaranteed associational rights which this Court has recognized in a more meaningful manner.

CONCLUSION

The Supreme Court of Wisconsin has held "that the Wisconsin open primary law violates neither the state nor the federal constitution." If this ruling is allowed to stand it will reverse the democratic progress achieved in the area of National Democratic Party affairs over the past twelve years. It would also render meaningless the "constitutionally protected right of political association" enjoyed by The National Democratic Party and its adherents this Court recognized in its Cousins v. Wigoda decision. The process

of selecting delegates and nominating candidates for the highest elective offices in our Nation is undeniably within the parameters of this protected right. If it were otherwise the vitality of this right would always be dependent upon the vagaries of state officials and others who can be and often are subjected to political pressures and considerations of an undemocratic nature. We respectfully submit that the decision below should be reversed.

Respectfully submitted,

THOMAS F. NEALON III
60 Chatsworth Avenue
Larchmont, New York 10538
(914) 834-8746

Attorney for Amicus Curiae